

**Summary:** The defendant filed a motion to modify or reduce her sentence. The Court denied the motion, finding that recent amendments to the United States Sentencing Guidelines have no impact on the defendant's total offense level, criminal history points, or criminal history category designation and, therefore, a modification or reduction in the defendant's sentence is not warranted.

**Case Name:** USA v. Nancy Elizabeth Ferneau

**Case Number:** 1-03-cr-46

**Docket Number:** 246

**Date Filed:** 4/8/08

**Nature of Suit:**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NORTH DAKOTA  
SOUTHWESTERN DIVISION**

United States of America,	)	
	)	
Plaintiff,	)	<b>ORDER DENYING DEFENDANT'S</b>
	)	<b>MOTION TO MODIFY OR</b>
vs.	)	<b>REDUCE SENTENCE</b>
	)	
Nancy Elizabeth Ferneau,	)	Case No. 1:03-cr-046-03
	)	
Defendant.	)	

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Before the Court is the Defendant's "Motion for Modification or Reduction of Sentence" filed on March 20, 2008. See Docket 243. The defendant, Nancy Elizabeth Ferneau, contends that a recent amendment to the United States Sentencing Guidelines warrants a reduction in her sentence because it alters the computation of her criminal history. The Government filed a response in opposition to the motion on March 28, 2008. See Docket 245.

Ferneau was found guilty of drug trafficking by a jury on December 18, 2003, and sentenced on March 8, 2004. Ferneau was sentenced under the United States Sentencing Guidelines in effect as of November 1, 2003. The Presentence Investigation Report (PSR) recommended a base offense

level of 34 with a two-level increase for an aggravating role in the offense, resulting in an adjusted offense level of 36. The Court did not adopt the two-level aggravating role enhancement. This resulted in an adjusted offense level of 34, criminal history category VI, and an advisory sentencing range of 262-327 months. Ferneau was sentenced to 300 months imprisonment. She appealed the conviction and sentence which was affirmed by the Eighth Circuit Court of Appeals. See U.S. v. Barth, 424 F.3d 752 (8th Cir. 2005).

A careful review of Ferneau's extensive criminal history was set forth in the PSR. From 1987 to 2002, Ferneau was charged with eight separate crimes that did not trigger any criminal history points under § 4A1.1 of the Sentencing Guidelines.<sup>1</sup> See PSR ¶¶ 36, 38, 40, 42, 69, 75, 77, 78. From 1990 to 1994, Ferneau pled guilty to nine separate theft charges, each resulting in one criminal history point pursuant to § 4A1.1(c). See PSR ¶¶ 44, 46, 48, 50, 52, 54, 56, 58, 60. In 1995, Ferneau pled guilty to two felony drug charges, each resulting in one criminal history point pursuant to § 4A1.1(c). See PSR ¶¶ 62, 64. Pursuant to § 4A1.1(a) and (b), Ferneau received two criminal history points for possession of a firearm charge in 1996; two points for a drug charge in 2001; two points for a separate drug offense in 2001; and three points for a 2002 crime with numerous counts.<sup>2</sup> See PSR ¶¶ 66, 71, 73, 80. This history resulted in a total of twenty (20) criminal history points. However, in accordance with § 4A1.1(c), only a total of four points were assessed to Ferneau's eleven prior convictions which had resulted in a sentence of imprisonment of less than

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<sup>1</sup> The total criminal history points from § 4A1.1 determine the criminal history category (I-VI) in the Sentencing Table.

<sup>2</sup> In accordance with § 4A1.1(a), three points are added for each prior sentence of imprisonment exceeding one year and one month. Under § 4A1.1(b), two points are added for each prior sentence of imprisonment of at least sixty days not counted in § 4A1.1(a). There is no limit to the number of criminal history points that may be counted under § 4A1.1(a) or (b).

sixty days. The PSR reveals that Ferneau's total criminal history point tabulation was correctly reduced to thirteen points [a maximum of four points for § 4A1.1(c) convictions plus nine points for § 4A1.1(a) and (b) convictions]. A total of thirteen criminal history points placed Ferneau in criminal history category VI.

The Court adopted the criminal history tabulation of thirteen points which resulted in a criminal history category VI designation. As previously noted, Ferneau was sentenced to 300 months imprisonment based on an adjusted offense level of 34, criminal history category VI, with an advisory sentencing range of 262-327 months under the Sentencing Guidelines in effect in 2003.

On March 20, 2008, Ferneau filed a motion to modify or reduce her sentence pursuant to 18 U.S.C. § 3582(c)(2), based on a recent amendment to the United States Sentencing Guidelines that modifies the method of calculating a defendant's criminal history score in certain respects. The Sentencing Commission adopted Amendment 709, effective November 1, 2007, which addressed the computation of criminal history scores in two areas: (1) the counting of multiple prior sentences as "single" or "separate" sentences (previously called "related sentences") and (2) the counting of certain misdemeanor or petty offenses subject to a probationary term. See USSG, App. C, Amend. 709.

Pursuant to this amendment, a court must count prior sentences as "separate" sentences when there is an intervening arrest, i.e., the defendant is arrested for the first offense prior to committing the second offense. If there was not an intervening arrest, the prior sentences are still counted as "separate" sentences unless the sentences were for offenses that were named in the same charging document or the sentences were imposed on the same day. This amendment effectively eliminated the requirement imposed by some circuit courts, including the Eighth Circuit Court of Appeals, that

there be a formal order of consolidation for sentencing before the prior sentences could be considered a single sentence.

Second, pursuant to the recent amendment, misdemeanor or petty offenses listed in § 4A1.2(c)(1) are counted in the criminal history score only if the sentencing court imposed at least thirty days imprisonment or “more than” one year of probation. Previously, these types of misdemeanor offenses were counted if the sentencing court imposed at least thirty days imprisonment or “at least” one year of probation. Despite this recent amendment to the Sentencing Guidelines, Ferneau is not entitled to a sentence reduction because a re-calculation of the criminal history points she accumulated would not affect her criminal history category.

The PSR reveals that Ferneau had accumulated eleven criminal history points for § 4A1.1(c) offenses. Each of the offenses resulted in “separate” sentences with the exception being two theft charges for which sentence was imposed on the same day, i.e., May 29, 1991. See PSR ¶¶ 48, 50. Irrespective of these two consolidated sentences, Ferneau had accumulated nine criminal history points for § 4A1.1(c) offenses but only a total of four points were assessed to those § 4A1.1(c) convictions as required by the Sentencing Guidelines. Further, the recent amendment to the Guidelines dealing with the calculation of criminal history points for misdemeanor or petty offenses does not in any manner affect Ferneau’s criminal history because she did not receive any criminal history points for the three driving under suspension charges that qualify as misdemeanor or petty offenses under § 4A1.2(c)(1). See PSR ¶¶ 69, 75, 78. Even with a re-calculation of her criminal history points, Ferneau continues to have a total of thirteen points, resulting in a criminal history category VI designation. The recent amendments to the Sentencing Guidelines have no impact

whatsoever in the re-calculation of Ferneau's total criminal history points or the criminal history category designation.<sup>3</sup>

The Court has carefully reviewed the PSR and finds that Ferneau's total adjusted offense level, criminal history points, and criminal history category were properly calculated. The recent amendments to the Sentencing Guidelines do not in any manner warrant a modification or reduction in Ferneau's sentence. Therefore, the Court **DENIES** the Defendant's motion to modify or reduce her sentence. (Docket 243.)

**IT IS SO ORDERED.**

Dated this 8th day of April, 2008.

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*/s/ Daniel L. Hovland*

Daniel L. Hovland, Chief Judge  
United States District Court

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<sup>3</sup> The Court would note that even if a re-calculation of Ferneau's criminal history points would reflect a different total, the recent Amendment 709, effective November 1, 2007, would not apply retroactively. See USSG, Supp. to 2007 Supp. to App. C, Amend. 712, Revised Section 1B1.10(a) and (c). In other words, even if the criminal history computation changes made as a result of Amendment 709 affected Ferneau's criminal history score, the relief being requested could not be granted because the amendment would not have retroactive application.